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No. 87-764

In The
Supreme Court of the United States
October Term, 1987

STATE OF FLORIDA,

Petitioner,

v.

MICHAEL A. RILEY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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INTRODUCTION

Respondent, MICHAEL A. RILEY, respectfully requests that this Court deny the State of Florida's petition for a writ of certiorari seeking review of the published opinion of the Supreme Court of the State of Florida, submits the following as his Brief in Opposition.

STATEMENT OF THE CASE

In August of 1984 Respondent, MICHAEL A. RILEY, was charged with the unlawful possession and manufacture of marijuana. Respondent lived in a residential mobile home, which had a greenhouse-type structure located ten (10) to twenty (20) feet from the mobile home. Contained within the greenhouse was the marijuana which is the subject of this case. The greenhouse was enclosed on two sides while the remaining sides were obscured by both trees, shrubbery and the mobile home. The mobile home and greenhouse were enclosed by a wire fence and had a "do not enter" sign posted. The contents of the greenhouse were obscured from all ground views outside the fenced property due to the sides of the greenhouse, the mobile home and the shrubbery. The greenhouse also had a roof in which two panels were missing, exposing approximately one-tenth of the roof area.

Deputy Gell of the Pasco County Sheriff's Department, acting upon an anonymous tip that marijuana was growing on the Respondent's property, went to that location. Deputy Gell was unable to determine from outside Respondent's property what was growing in the greenhouse. Deputy Gell then secured a helicopter which flew over Respondent's residence. The helicopter flew over the greenhouse and residence of Respondent at approximately 400 feet and circled the greenhouse and residence twice. Deputy Gell also took photographs of the greenhouse from the helicopter.

Through the openings in the roof and through the open side of the greenhouse, Deputy Gell observed what he believed to be marijuana and then obtained a warrant to

search the greenhouse, resulting in the seizure of marijuana plants from the greenhouse.

Michael A. Riley was charged by information on August 16, 1984 with two counts of violating § 893.13, Florida Statutes (1983) (the unlawful manufacture and possession of marijuana). Respondent filed a motion to suppress evidence on December 19, 1984. After a hearing on the motion, the trial court issued its Order suppressing the evidence.

The State took an appeal to the Second District Court of Appeals for Florida. Florida's Second District Court of Appeals reversed the trial court's order in its opinion issued on October 16, 1985. The opinion also certified the case to the Florida Supreme Court as a question of great public importance.

The Florida Supreme Court reviewed the decision and reversed the District Court's opinion on July 9, 1987.

The State filed a motion for rehearing on July 11, 1987. This motion was denied on September 11, 1987.

In the opinion below, the Florida Supreme Court held that the surveillance of the interior of a partially covered greenhouse in a residential backyard from a vantage point of a helicopter located 400 feet above the greenhouse constituted a "search" for which a warrant is required under the Fourth Amendment and Article I, § 12 of the Florida Constitution. The Court found that Riley's legitimate expectation that the contents of his greenhouse would not be viewed from a helicopter hovering below 500 feet was reasonable.

The Court applied the two-pronged test of *Katz v. United States*, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507

(1967), and held Respondent exhibited an actual subjective expectation of privacy and that his expectation was reasonable. The Court reached the conclusion based upon an examination of both *California v. Ciraolo*, 106 S.Ct. 1809 (1986) and *Dow Chemical Co. v. United States*, 106 S.Ct. 1819 (1986) and determined that the details observed from a helicopter hovering at 400 feet could not have been discovered by any person casually flying over the area in a fixed wing aircraft. The Court also noted that a helicopter hovering at 400 feet so its occupants could look through an opening in a roof is much more physically intrusive than a fixed wing aircraft flying at 1,000 feet.

The State filed their Petition for Writ of Certiorari contending the decision of the Florida Supreme Court conflicts with this Court's decision in *California v. Ciraolo* (supra).

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REASONS FOR DENYING THE WRIT

Petitioner, the State of Florida, contends this court should grant a writ of certiorari in this matter because the decision of the Florida Supreme Court, *Riley v. State*, 511 So.2d 282 (Fla. 1987), conflicts with this court's decision in *California v. Ciraolo*, 476 U.S. —, 90 L.Ed.2d 210, 106 S.Ct. 1809 (1986).

The decision of the Florida Supreme Court in the case subjudice is consistent with *Ciraolo* and the prevailing legal principles interpreting the right to privacy as applied to the Fourth Amendment of the United States Constitution. This court recently denied the petition for writ of

certiorari by the State of California in *People v. Sabo*, 185 Cal.App. 3d 845, 230 Cal.Rptr. 170 (Cal.App. 1986), *Cert. Denied* 107 S.Ct. 2200 (1987). *Sabo* is a case in which the facts and legal arguments advanced by the State of California are identical to those in the case subjudice. The State of California contended that the decision of the California Appellate Court invalidating an aerial search of the interior of a backyard greenhouse from the vantage point of a helicopter at an altitude of approximately 400 feet conflicted with this court's decision in *Ciraolo*. Inherent in the denial of the petition for writ of certiorari, was a rejection of the argument advanced by the State of California.

Ciraolo did not give a blanket approval to all aerial searches regardless of the height or manner in which they are made. The Florida Supreme Court, in this matter, noted the significant factual differences between this case and *California v. Ciraolo* and correctly applied the two-pronged test of *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507 (1967). The Florida Supreme Court determined Respondent had demonstrated an actual subjective expectation of privacy that the interior of his greenhouse would not be subject to surveillance from a helicopter hovering at approximately 400 feet in a manner which enabled its occupants to peer through openings in the greenhouse's roof or sides, and that Respondent's expectation was reasonable. Furthermore, the helicopter was operating at less than the minimum altitudes of 1,000 feet in congested areas and 500 feet in non-congested areas designated as navigable airspace, United States Code section 1301 (29) and 14 Code of Federal Regulations section 91.79. The Florida court properly determined that the observations

made by the law enforcement officers in this case constituted a search under the Fourth Amendment to the Federal Constitution and Article I, Section 12, of the Florida Constitution, for which a warrant was required.

Rather than merely disagreeing with this court's decision in *Ciraolo,* the Florida Supreme Court applied the rationale of both *Ciraolo, Katz* and other Federal and State court decisions to a factual situation markedly different than that which existed in *Ciraolo.* This court should, therefore, deny the writ of certiorari.

ARGUMENT

I.

RESPONDENT HAD A REASONABLE EXPECTATION OF PRIVACY IN THE CONTENTS OF THE GREENHOUSE LOCATED WITHIN THE CURTILAGE OF HIS HOME.

This court's opinion in *California v. Ciraolo,* 476 U.S. —, 90 L.Ed.2d 210, 106 S.Ct. 1809 (1986), reaffirmed the standard set forth in *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507 (1967). *Katz* established a two-pronged test for determining whether the government has intruded upon an individual's reasonable expectation of privacy and posed the following inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search; second, is society willing to recognize that expectation as reasonable. In *Ciraolo* this court determined the Respondent did not have a reasonable expectation of privacy that the marijuana growing in his

backyard would not be observed from the vantage point of a fixed wing airplane at an altitude of 1,000 feet. This court stated:

> "The observations by officers Shutz and Rodriquez in this case took place within public navigable airspace, see 49 USC App. Section 1304, in a physically nonintrusive manner; from this point they were able to observe plants readily discernable to the naked eye as marijuana. That the observation from aircraft was directed at identifying the plants and the officers were trained to recognize marijuana is irrelevant. Such observation is precisely what a judicial officer needs to provide a basis for a warrant. Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed. On this record, we readily conclude that Respondent's expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor."
>
> (106 S.Ct. at p. 1812)

The factual differences between *Ciraolo* and the case subjudice are significant. Here the marijuana was located within a greenhouse whose interior was hidden from observation by the sides of the greenhouse, shrubbery, Respondent's residence and a roof. Only by circling the greenhouse at an altitude of approximately 400 feet and peering through two missing panels in the roof or looking through an opening in the side between the shrubbery and the roof could the contents within the greenhouse be observed. *Ciraolo,* on the other hand, merely had a fenced back yard in which the marijuana was completely open to the skies and easily visible to an officer in a fixed wing aircraft flying at 1,000 feet.

Petitioner's allegation that any helicopter pilot or passenger lawfully flying over Respondent's house could have seen everything the officers observed is not supported by the record and, in fact, the record on appeal, including the photographs, would negate that assumption. The Florida Supreme Court, in this matter, specifically noted:

> "We do not believe that the details observed here from the vantage point of a circling and hovering helicopter could just as easily have been discerned by any person casually flying over the area in a fixed wing aircraft."
>
> (511 So.2d at p. 288)

These factual differences completely remove the case subjudice from the situation in *Ciraolo.*

Nor is this court's decision in *Dow Chemical Company v. United States,* 106 S.Ct. 1819 (1986) applicable to the case subjudice. In *Dow* government agents took aerial photographs of Dow's industrial complex from altitudes of 12,000, 3,000 and 1,200 feet. This Court noted that the open areas of an industrial plant are not analogous to the curtilage of a dwelling but are more comparable to an open field.

The curtilage has consistently been given greater Fourth Amendment protection than open fields. *Hester v. United States,* 265 U.S. 57 (1924), *Oliver v. United States,* 466 U.S. 170, 104 S.Ct. 1735 (1984), *United States v. Dunn,* 107 S.Ct. 1134 (1987). Courts have further recognized that the curtilage extends to residential backyards and out buildings located close to the residence. *Taylor v. United States,* 286 U.S. 1 (1932), *United States v. Williams,* 581 Fed. 2d 451 (5th Circuit) (1978), *Cert. Denied,* 440 U.S.

972 (1979), *Huffer v. State,* 344 So.2d 1332 (Fla. 2d DCA 1977) (which involved a greenhouse located 20 feet from the residence).

Respondent clearly attempted to shield the contents of his greenhouse from both ground and air observations. The interior of the greenhouse was completely obscured from ground observation and the roof did not allow casual observation from the air. It is not necessary that Respondent have been completely successful in concealing the contents of his greenhouse from observation in order to receive Fourth Amendment protection, *United States v. Broadhurst,* 612 F. Supp. 777 (DC CAL 1985), nor does the fact that technology exists which enables the police to view its contents from a separate vantage point result in the loss of Fourth Amendment protection, *Wheeler v. State,* 659 S.W.2d 381 (Tex. Crim. App. 1982). As the Florida Supreme Court stated in *Riley* subjudice:

> "As we already have noted, *Katz* warned of the dangers created by technological advances by which police can conduct surveillance."
>
> (511 So.2d at p. 287)

Other courts have found helicopter surveillance violative of Fourth Amendment rights. *Blalock v. State,* 476 N.E.2d 901 (Ind. App. 1 Dist. 1985) held the aerial surveillance of a greenhouse violated Blalock's reasonable expectation of privacy. The court stated:

> "We conclude that aerial surveillance violated Blalock's Fourth Amendment rights. It could not, therefore, form the basis for the subsequent issuance of a search warrant."
>
> (476 N.E.2d at p. 904)

United States v. Broadhurst, 612 F. Supp. 777 (DC CAL 1985), likewise held an aerial search of a greenhouse impermissible. The court stated:

> "In short the court is aware of no decisions which would extend the practice of overflight by investigative officers to searches of the interior of residences and other structures. Furthermore, such an extension would, in this court's view, pose extremely dangerous consequences for the future protection of precious Fourth Amendment rights."
>
> (612 F. Supp. at p. 794)

The court, in *Broadhurst* further rejected the argument that police observed the contraband from a place they had a right to be, noting a difference between an individual who, though in a protected area, takes no precautions to shield his activities from public view as opposed to an individual who attempts to shield those activities from view.

Of particular importance is *People v. Sabo* (supra), a case identical in all material respects to the case subjudice. In *Sabo*, the California Court of Appeals held the observation of marijuana growing within a backyard greenhouse from the vantage point of a helicopter hovering at 400 to 500 feet, allowing its occupants to look through several missing roof and side panels constituted an unreasonable invasion of the Respondent's expectation of privacy and the seizure of the marijuana, pursuant to the issuance of a warrant based upon the helicopter viewing, violated Respondent's Fourth Amendment rights. The court, in *Sabo*, specifically took into consideration this court's opinion in *Ciraolo* and as did the Florida Supreme

Court in the case subjudice noted the important factual differences between the occupants of a fixed wing aircraft, flying in navigable airspace at 1,000 feet, observing marijuana in an open backyard and the occupants of a helicopter hovering at 400 to 500 feet peering through the holes in the roof of a greenhouse located in a residential backyard. The court, in *Sabo*, stated:

> "While the naked eye observation of marijuana growing in an open backyard from Ciraolo's fixed wing aircraft flying at 1,000 feet on a straight and narrow course in navigable airspace does not violate a reasonable expectation of privacy. Respondents assert a helicopter hovering at 400 feet, positioned to peer through gaps in a roof, intrusively invades and impermissibly violates a reasonable expectation of privacy."
>
> (230 CAL Rptr. at p. 173)

The court, in *Sabo*, also distinguished between the reality of helicopter surveillance as opposed to surveillance from fixed wing airplanes in navigable airspace The court stated:

> "To say any sighting from a helicopter in non-navigable airspace validates a search warrant, sanctions a broad range of aerial acrobatics performed in lawful manner but admittedly intrusive, such as an interminable hovering, a persistent overfly, a tree-top observation, all accomplished by the thrashing of the rotor, the clouds of dust, and ear-splitting din. Views from navigable airspace are far removed from the situs observed."
>
> (230 CAL Rptr. at p. 175)

Petitioner's reliance on this court's decision in *United States v. Knotts*, 460 U.S. 276, 75 L.Ed.2d 55, 103 S.Ct.

1081 (1983) is misplaced. This court based its decision upon the fact that the monitoring of Knotts occurred while he was in his automobile and travelling on public thoroughfares. The court also reiterated Knott's expectation of privacy within his dwelling:

> "Respondent, Knotts, as the owner of the cabin and surrounding premises to which Petschen drove, undoubtedly had the traditional expectation of privacy within a dwelling place insofar as the cabin is concerned . . .
>
> But no such expectation of privacy extended to the visual observations of Petschen's automobile arriving on his premises after leaving a public highway, nor to movements of objects such as the drum of chloroform outside the cabin in the 'open fields'." (citations omitted)
>
> (103 S.Ct. at p. 1085)

Likewise, Petitioner's reliance on *United States v. Karo,* 468 U.S. 705, 104 S.Ct. 3296 (1984), is faulty. In *Karo,* the court specifically stated that the use of a beeper to monitor activities within a residence violates the Fourth Amendment rights of those with a privacy interest in the residence. Neither *Knotts* nor *Karo* can justify the aerial surveillance of a greenhouse located within the curtilage of a residence, when there has been an actual subjective manifestation of privacy from both ground and aerial surveillance. To argue that surveillance of a protected area is justified as long as that surveillance occurs from outside the protected area; is contrary to established Fourth Amendment principles. The central point of *Katz* is that individuals do not lose Fourth Amendment protection merely because technology exists which enables the police

to make observations from vantage points outside the protected areas.

The State of Florida advances the same arguments as did the State of California in their unsuccessful petition for writ for certiorari in *Sabo.* The difference between the significant intrusion upon privacy rights which occurred in the case subjudice and the minimal intrusion which occurred in *Ciraola* are such that would mandate a denial of the State of Florida's petition for writ of certiorari.

II.

THE CONCEPT OF NAVIGABLE AIRSPACE DOES NOT OPERATE TO VALIDATE HELICOPTER SURVEILLANCE OF RESIDENTIAL AREAS FROM ALTITUDES LESS THAN FIVE HUNDRED (500) FEET.

Petitioner argues the helicopter in the case subjudice was operating in navigable airspace and thus the surveillance of Respondent's greenhouse was permissable within the purview of the Fourth Amendment. The crux of this argument is Petitioner's contention that "lawful flight" and "navigable airspace" are synonymous. This argument was rejected by both the Florida Supreme Court in this case and the California Supreme Court in *People v. Sabo,* (supra). The California court stated:

> "While helicopters may be operated at less than minimum altitudes so long as no hazard results, it does not follow that such operation is conducted within navigable airspace.[3] The plain meaning of the statute

defining navigable airspace as that airspace above specified altitudes compels the conclusion helicopters operated below the minimum are not in navigable airspace".

(230 CAL Rptr. at p. 174-175)

Navigable airspace is defined in 49 United States Code section 1301 (29) as follows:

> "(29) 'Navigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in takeoff and landing of aircraft".

In 14 Code of Federal Regulations, these minimum altitudes are specified as follows:

"§ 91.79 Minimum safe altitude; general.

"Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

"(a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons, or property on the surface.

"(b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

"(c) Over other than congested areas. An altitude of 500 feet above the surface except over open water or sparsely populated areas. In that case, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure."

The regulations then specify that helicopters may be lawfully operated at less than the specified minimum altitudes. Section (d)–reads as follows:

> "(d) Helicopters. Helicopters may be operated at less than the minimums prescribed in paragraph (b) or (c) of this section if the operation is conducted without hazard to person or property on the surface. In addition, each person operating a helicopter shall comply with routes or altitudes specifically prescribed for helicopters by the administrator."

Thus, helicopters may be operated at an altitude less than the specific minimums designated as navigable airspace, i.e. 1,000 or 500 feet, as long as such operation can be conducted safely. A helicopter, in certain situations, may be safely operated at 100 feet, but one could hardly argue that navigable airspace encompasses altitudes that low. The legislative notes to 14 Code of Federal Regulations section 60.17(b) 1949, which is the predecessor to the current 14 Code of Federal Regulations section 91.79(d), are significant. This regulation permitted helicopter flight below 1,000 feet. The notes to subsection (b) stated:

> "The rule recognizes the special flight characteristics of the helicopter which can accomplish an emergency landing within a relatively small space. However, if a helicopter is flown over a congested area . . . at less than 1,000 feet above the highest obstacle, the pilot is required to fly with due regard to places in which an emergency landing can be made with safety, and further, to maintain an altitude along the flight path thus selected from which such an emergency landing can be affected at any time."

Respondent would contend that the legislative definition of navigable airspace is a 1,000 minimum above con-

gested areas and 500 feet over noncongested areas. Helicopters operated below navigable airspace may be done so lawfully but the legislative notes indicate, the pilot is required to fly with due regard to places in which an emergency landing can be made with safety and to maintain an altitude *along the flight path* from which an emergency landing may be accomplished at any time. Circling or hovering a helicopter over a residential home or in a residential neighborhood in order to peer through the holes in the roof of a backyard greenhouse does not appear consistent with a due regard for an emergency landing and surely is not consistent with a flight path conducive to an emergency landing at any time. Nor does it appear consistent with subsection (a) of 14 Code of Federal Regulations § 91.79 which requires an altitude allowing an emergency landing without danger to persons or property in case of a power failure. The actions of the law enforcement officers by circling and hovering the helicopter over Respondent's home and backyard at an altitude of 400 feet clearly were not operating within navigable airspace and arguably were not operating the helicopter lawfully.

The courts in both *Sabo* and the case subjudice noted the extraordinarily instrusive nature of helicopter surveillance. The Florida Supreme Court in *Riley* stated:

> "Surveillance by helicopter is particularly likely to unreasonably intrude upon private activities".
>
> (511 So.2d at p. 288)

Other courts have also recognized the serious risk to privacy which may result from helicopter surveillance. In *N.O.R.M.L. v. Mullen*, 608 F.Supp. 945 (N.D. CAL 1985), the court stated:

> "It is not just the highly disruptive character of low helicopter flights that distinguishes them from the common airplane overflights that we are all accustomed to, but also the degree of their intrusiveness into the privacies of life; an airplane can see far less than a helicopter that is hovering outside a bedroom window or over an open outhouse or shower. This case demonstrates how the unique versatility of helicopters renders them at once an effective law enforcement tool and an unprecedented threat to civil liberities".
>
> (608 F.Supp. at p. 957)

To hold as permissible, a warrantless aerial search of a residential area in which an individual has manifested an expectation of privacy, by a helicopter at an altitude of 400 feet, on the basis that the surveillance occurred from outside the protected area, would constitute a dangerous eroding of the Fourth Amendment protection from unreasonable search and seizures. The question of the type of surveillance and intrusion which are permissible would become both difficult and confusing. Would a helicopter hovering at 100 feet be unacceptable? Would a helicopter hovering in such a manner as to peer through an upper story window of a residence be unacceptable? Would the use of sophisticated equipment enhancing the ability to hear and see inside residences be unacceptable? Once the focus of the courts depart from the actual and reasonable expectation of privacy, the rights of the citizenary depart with it. Respondent would argue that society is not willing to hold as unreasonable, the privacy rights of individuals in their homes, structures and backyards to be free from government surveillance by hovering and circling helicopters at altitudes of less than 500 feet.

The decision of the Florida Supreme Court in the case subjudice, holding that Respondent had a reasonable expectation that the interior of his greenhouse would not be subjected to aerial surveillance by a helicopter hovering at an altitude of 400 feet and that such surveillance constituted a search within the purview of the Fourth Amendment for which a warrant was required, is not in conflict with this court's decision in *California v. Ciraolo*. Therefore, this court should deny the petition for writ of certiorari.

CONCLUSION

Based upon the authorities, statutes, regulations and argument cited herein, this court should deny the Petitioner's request for writ of certiorari.

Respectively submitted,

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